SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-005821 11/20/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

APOLLO GENERAL CONTRACTING INC

JAY M MANN
CYNTHIA R ESTRELLA

v.

DIVERSIFIED ASPHALT INC, et al.

WESLEY S LOY

MONTGOMERY LEE
AZ REGISTRAR OF CONTRACTORS
OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

This case is an Administrative Review action pursuant to A.R.S. Section 12-901 et seq. This Court took this matter under advisement after oral argument on September 24, 2003. This Court has reviewed the certified record from the Arizona Registrar of Contractors and Office of Administrative Hearings, the excellent pre- and post-hearing memoranda submitted by counsel, counsels' oral arguments, the exhibits, depositions, and evidence presented to this court at the evidentiary hearings.

(1) Standard of Review

Pursuant to A.R.S. Section 12-910(e), this Court may review administrative decisions in which the State is a party:

> The court may affirm, reverse, modify or vacate and remand the agency action. The Court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

This Court's scope of review of agency determinations pursuant to the Administrative Review Act requires the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious or an abuse of discretion.[1] Only where an agency's decision is not supported by competent evidence should the reviewing court set it aside as being arbitrary and capricious.[2] A reviewing court may not substitute its own discretion for that exercised by an administrative agency,[3] but must only determine if there is competent evidence to sustain the decision.[4]

This Court has previously granted Plaintiff's, Apollo General Contracting, Inc. (hereafter referred to as "Apollo") Motion for Evidentiary Hearing. This Court granted that motion because Apollo failed to appear at the time scheduled for hearing by the administrative law judge assigned to hear this matter. Apollo had no opportunity to present evidence or arguments in support of its position before the administrative agency, with the exception of its Motions for Reconsideration. This Court has considered the evidence presented to it consistent with the standard enunciated by the Arizona Court of Appeals in Shaffer v. Arizona Liquor Board[5]:

> We therefore conclude that while the language of statute [A.RS. Section 12-910(E)] allows for supplementing the administrative record in the Superior Court, it does not permit a trial de novo in every instance. Rather, the Superior Court determines from the administrative record and the supplementing evidence whether substantial evidence still exists in the record to support the administrative decision. The Court, as before, defers to the administrative decision if substantial evidence supports it. If, on the other hand, the court concludes that the new or additional evidence is such that, had it been introduced in the administrative proceedings, no reasonable fact finder would have reached the administrative decision, than the latter is not supported by substantial evidence. The Superior Court may accordingly "reverse, modify or vacate and remand the agency action." (citation omitted).[6]

This Court has considered the new evidence introduced by both parties in the context of whether had that evidence been introduced in the administrative proceedings, a reasonable fact finder would have reached the decision made by the administrative law judge in this case.

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[1] Klomp v. Arizona Dept. of Economic Security, 124 Ariz. 556, 611 P.2d 560 (App. 1980); Sundown Imports Incorporated v. Arizona Dept. of Transportation, 150 Ariz. 428, 565 P.2d. 1289 (App. 1977).
[2] City of Tucson v. Mills, 114 Ariz. 107, 559 P.2d 663 (App. 1976).
[3] Arizona Dept. of Economic Security v. Lidback, 26 Ariz. App. 143, 546 P.2d 1152 (1976).
[4] Schade v. Arizona State Retirement System, 109 Ariz. 396, 510 P.2d 42 (1973); Welsh v. Arizona State Board of Accountancy, 14 Ariz. App. 432, 484 P.2d 201 (1971).
[5] 197 Ariz. 405, 4 P.3d 460 (App. 2000).
[6] Id., 197 Ariz. at 409, 4 P.3d at 464.

(2) Facts and Procedural History

In March of 2000, Apollo successfully bid for construction of a large storage facility located at 1023 E. Frye Road, in Phoenix, Arizona. Apollo was the general contractor for this project whose original contract price exceeded one million dollars. Defendant and Real Party in Interest, Diversified Asphalt, Inc., (hereafter referred to as "Diversified") is an Arizona corporation specializing in asphalt and paving. The storage facility at issue required extensive paving in and around the various storage units to allow access to the units by tenants. Diversified began work on the project in March or April of 2000 based upon an oral argument with Apollo. Diversified actually stopped working on the project because of a lack of a written contract and Apollo's failure to provide a written contract. Finally, on April 26, 2000, Apollo faxed a "subcontract agreement" to Diversified. Both parties signed this contract, which purported to encompass all of the informal work orders and modification orders previously exchanged between the parties. However, Diversified claims that only the one page subcontract agreement was faxed to them without the addendum entitled "General Terms". That contention seems credible and is not seriously disputed by Apollo. Apollo, however, claims that the contract must be read as a whole and that the "General Terms" of the contract are referred to within the "subcontract agreement" and incorporated by reference. This issue is of paramount importance because the "General Terms" of the subcontract agreement (a separate five-page document) contains a "pay when paid" clause that conditions payment to the subcontractor (Diversified) upon the receipt of payments by the general contractor (Apollo). The terms of the actual contract between the parties became relevant when the owner of the property developed financial problems and was not able to pay Apollo, who in turn failed to pay Diversified for the work that Diversified had performed.

Diversified filed a complaint against Apollo with the Arizona Registrar of Contractors on May 31, 2001. A hearing was held January 11, 2002 before Administrative Law Judge Robert Worth. Apollo failed to appear at this hearing, believing mistakenly that the hearing had been postponed. Judge Worth issued a detailed recommended decision and order to the Registrar of Contractors, dated January 22, 2002. That order recommended that Apollo's license be revoked and ordered restitution by Apollo in the amount of $160,000.00. The administrative law judge considered the numerous work orders, modifications, and changes to the original contract that was mutually agreed upon by both parties. However, because Apollo did not attend the hearing, the administrative law judge could not consider Apollo's claims for set-offs from the amount calculated as the total restitution.

On March 12, 2002, the Registrar of Contractors approved and adopted the administrative law judge's recommended order and decision and denied Apollo's Petition for Rehearing. Thereafter, on March 28, 2002, Apollo filed this Administrative Review Action in the Superior Court. Previously, this Court has denied Apollo's request for a stay of the Registrars' order pending appeal, and Apollo's request for a trial *de novo*. Apollo's request for

evidentiary hearing was granted, and this Court has received and considered the testimony, depositions, and exhibits presented at those evidentiary hearings.

(3) Issues Presented.

Apollo raises several issues in this Administrative Review Action:

(1) Diversified is not entitled to payment until the project owners pay Apollo because of the "pay when paid" clause contained in the "General Terms" of the subcontract agreement of April 26, 2000.

(2) Even if Apollo owes Diversified some money, is Apollo entitled to withhold set-off amounts for alleged incomplete and deficient work by Diversified?

(3) Whether sufficient and substantial evidence exists to support the findings and order of the Registrar of Contractors?

(4) Discussion.

(a) The "Pay When Paid" Clause.

It is clear from the evidence presented to this Court that the contract of April 26, 2000 was intended by both parties to be the defining document of their previous oral and written agreements. Unfortunately, the six-page "General Terms""[7] was not provided to Diversified. The "subcontract agreement" consists of a one-page, with several terms and a provision for both parties to sign and date the contract. Subsequent to the first page are an additional six-pages entitled "General Terms". These general terms contain the provision cited by Apollo and discussed as the "pay when paid" clause that requires the general contractor to make payment to subcontractors to only after the general contractor has been paid by the project owner.

Apollo argues that even though the "general terms" were not attached to the original subcontract agreement when it was faxed to Diversified, that "general terms" are a part of that contract because they are incorporated by reference. The reference in the specific section of the "subcontract agreement" referred to by Apollo does not support Apollo's position. Rather, that provision in Section A of the "subcontract agreement" provides in pertinent part:

> Work to be completed in accordance with the contract documents (as defined in the general terms), Contractor's General Terms, Apollo General Contracting's Form B/Contract Drawing Schedule, Form C-Accident Prevention Plan, Form D-Construction's Schedule, and Form E-Subcontractor Application for Payment, all

[7] Admitted as Plaintiff's exhibit 2 on May 7, 2003 during the evidentiary hearing before this court.

> dated _____ *and attached hereto*, all of which shall become a part of this subcontract and all of which subcontractor hereby certifies he has read and understands the contents thereof (emphasis added).

However, nothing was attached to this subcontract agreement's only page. The terms and forms referred to in the above quoted portion of the one-page "Subcontract Agreement" were not dated and not attached. It seems clear from the language used in this provision of the contract that this "incorporation by reference clause" was conditioned upon the attachment and dating of documents to this contract.

When interpreting a contract, it is a fundamental rule that courts must ascertain and give effect to the intentions of the parties at the time the contract was made, if at all possible.[8] Where the written language of a contract offers more than one reasonable interpretation, a court may consider the surrounding circumstances at the time the contract was made between the parties.[9]

The evidence in this case is clear that when Diversified's principals (Ms. Patricia Carter)[10] signed the contract, she was presented with a one-page "subcontract agreement" with no attachments or addendums. Diversified had absolutely no knowledge of any "pay when paid" limitations or clauses in their agreements with Apollo. In fact, the subsequent conduct of the parties reflects that neither party believed a "pay when paid" clause existed, as Apollo continued to make representations to Diversified that it would be able to pay them for their work done. Apollo never claimed that it was not required to pay Diversified pursuant to a "pay when paid" clause until the commencement of the complaint before the Registrar of Contractors and these legal proceedings.

I must conclude that the contract entered into between the parties was reduced to a written form on April 26, 2000, and that the contract consisted of only one-page. I conclude that the "General Terms" attached to the "Subcontract Agreement" in exhibit 2 were not presented to Diversified prior to the signing of the contract and do not constitute a part of the parties' agreement.

I further note that the issue of the existence of a "pay when paid" clause was not presented to the administrative law judge. The administrative law judge only considered the one-page subcontract agreement. The administrative law judge, therefore, considered the correct and complete contract between the parties in making his recommended decision and order.

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[8] Taylor v. State Farm Mutual Automobile Insurance Company, 175 Ariz. 148, 854 P.2d 1134 (1993); Darner Motor Sales, Inc., v. Universal Underwriters Insurance Co., 140 Ariz. 383, 682 P.2d 388 (1984).
[9] Polk v. Koerner, 111 Ariz. 493, 496, 533 P.2d 660, 663 (1975).
[10] This Court heard the testimony of Patricia Carter and Jim Settle, both officers and principal agents of Diversified, at the evidentiary hearing in this case. This Court specifically finds that their testimony was the more credible, articulate and persuasive of the evidence presented.

(b) Is Apollo Entitled to Set-Offs?

Apollo's claims for set-off for poor workmanship, repairs and defects in the work completed by Diversified is a claim not considered by the administrative law judge. However, these claims are particularly suspect giving the timing of Apollo's assertion of these claims. Diversified completed its paving work in March of 2001. Thereafter, Diversified submitted all of its claims and requests for payments to Apollo. The mortgage lender on the property acknowledged Diversified's claims but requested a price reduction. The parties then entered negotiations to reduce the amount of money that would be paid to Diversified. Those negotiations were unsuccessful and resulted in Diversified filing its complaint with the Registrar of Contractors. For the first time, Apollo claimed in its answer to the Registrar of Contractors that repair work needed to be performed on the paving work completed by Diversified.

Many of the claims for poor workmanship involve issues of the grade and proper drainage from the pavement. However, Apollo was responsible for checking the grades prior to final paving.[11] Christopher Whelihan was the project manager for the storage facility and employed by Apollo. More importantly, several of the defects in workmanship alleged by Apollo were apparently caused because Whelihan had demanded that Diversified complete its paving even though there was a lot of mud on the property and Diversified had advised waiting for the mud to dry before paving.

In regards to the poor workmanship, defects and other claimed set-offs by Apollo, this Court has found that Apollo has failed to sustain its burden of proof that the set-offs are warranted in this case.

(c) Substantial Evidence to Support the Administrative Law Judge's and Agency's Determination.

When reviewing the sufficiency of the evidence, a reviewing court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[12] All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the party appealing.[13] If conflicts in evidence exists, a reviewing court must resolve such conflicts in favor of sustaining the judgment.[14] A reviewing

[11] Deposition of Christopher P. Whelihan of September 25, 2002, at pages 102-103, 136-137.
[12] State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v.Brown, 125 Ariz. 160, 608 P.2d 299 (1980); Hollis v. Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).
[13] State v. Guerra, supra; State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[14] State v. Guerra, supra; State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

court shall afford great weight to the trier of fact's assessment of witnesses' credibility and should not reverse the trier of fact's weighing of evidence absent clear error.[15] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[16] Similarly, this court must determine if substantial evidence exists to support the agency's decision. The Arizona Supreme Court has explained in *State v. Tison*[17] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[18]

(5) Conclusion.

This Court determines from the administrative record and the evidence presented to this Court, that substantial evidence exists within the record to support the decision made by the administrative law judge and the Registrar of Contractors. This Court concludes that the additional evidence it has received would not have changed the decision of the administrative law judge or the agency, had they been privy to it. This Court is not able to find that the evidence presented to it in the evidentiary hearing was of such a nature that, had it been presented to the administrative agency, no reasonable fact finder would have reached the decision made in this case. This Court concludes that the recommended decision of the Administrative Law judge and the order of the Registrar of Contractors is supported by substantial evidence, is not contrary to law, is not arbitrary and capricious and was not an abuse of discretion.

IT IS ORDERED affirming the decision of the Registrar of Contractors in this case.

IT IS FURTHER ORDERED denying all relief as requested by the Plaintiff in its Administrative Review Complaint filed in this case.

IT IS FURTHER ORDERED that Defendant/Real Party in Interest, Diversified Asphalt Inc., shall lodge an order consistent with this opinion no later than December 19, 2003.

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[15] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).
[16] *Hutcherson v. City of Phoenix,* 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).
[17] Supra.
[18] Id. At 553, 633 P.2d at 362.

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FILED: Exhibit Worksheet